

1 Appellant was represented by his attorney, Kelly Hancock of Omak,
2 Washington. The respondent was represented by Patricia Hickey,
3 Assistant Attorney General for the Department of Ecology at Olympia,
4 Washington.

5 Witnesses were sworn and testified. Exhibits were admitted and
6 examined. Oral and written argument were taken into the record. From
7 the testimony, evidence and argument, the Board makes these

8 FINDINGS OF FACT

9 I

10 Appellant Raymond Attwood owns several parcels of land in Okanogan
11 County near the town of Tonasket, Washington. He and his wife are
12 engaged in the business of ranching. Appellant holds certain surface
13 water rights appurtenant to these lands. The certificated surface
14 water rights arise from the Bonaparte Creek Adjudication, Cause No.
15 17787, which commenced in 1968 and ended on December 14, 1979.

16 II

17 Certificate No. 77 of the Bonaparte Creek Adjudication was issued
18 under the provisions of RCW Chapter 90.03 to Victor LeSamiz on
19 April 30, 1980, with a priority date of 1910. This certificate
20 confirmed the right to divert water from Bonaparte Creek for the
21 purpose of irrigating 20 acres from May 1 to October 31 each year in
22 an amount not to exceed 0.40 cfs or 80 acre-feet annually.

23 Certificate No. 77 is appurtenant to the parcel of land described as
24 the NE 1/4 of the NE 1/4 of Section 21, Okanogan County. The
25

1 authorized point of diversion is located within the E 1/2 of the NE
2 1/4 of the NE 1/4 of Section 21.

3 Appellant Attwood acquired the parcel to which Certificate No. 77
4 is appurtenant from his predecessors in interest, Victor and Golden
5 LeSamiz, by Quit Claim Deed on December 28, 1976. The NE 1/4 of the
6 NE 1/4 of Section 21 contains 40 acres; 32.8 of which are owned by the
7 appellant. Tax lots 9, 13, and 20 within the NE 1/4 of the NE 1/4 of
8 Section 21 are under different ownership. Water evidenced by
9 Certificate No. 77 is being used on these lots.

10 III

11 The referee for the Bonaparte Creek Adjudication found that 25
12 acres of the NE 1/4 of the NE 1/4 of Section 21 were irrigated in
13 1918. It was also found that irrigation occurred as early as 1910 the
14 priority date of certificate No. 77.¹ The earliest use that the
15 appellant can remember was made in 1936 when approximately 20 acres
16 were irrigated to raise alfalfa and personal gardens. This particular
17 use continued until 1944. Any beneficial use between 1944 and 1954 is
18 unknown. Appellant's predecessors in interest acquired the NE 1/4 of
19 the NE 1/4 of Section 21 in 1954. From 1955 until 1975 they made use
20 of a gravity-type irrigation system. A sprinkler pipe was used with
21 some flood irrigation. The exact amount of acreage irrigated during
22 those years is unknown. When appellant acquired the NE 1/4 of the NE
23 1/4 of Section 21 in 1976, the irrigation system was not useable. The
24

25 1. Wa. Department of Water Resources v. A & C Grazing Assn., Inc., et
al., Report of Referee, No. 17787, p. 106 (1976).

1 appellant last beneficially used the surface water in 1977, when
2 approximately four acres were flood irrigated for cow pasture.

3 IV

4 Appellant was aware that the Bonaparte Creek Adjudication was in
5 progress when he acquired the NE 1/4 of the NE 1/4 of Section 21. He
6 did not attempt to utilize the water or apply for a change of place of
7 use prior to the final decree because the right he believed was
8 appurtenant to this land had not yet been officially confirmed.
9 Appellant felt that to put the water to use would be a very large
10 expense and a very poor investment were the right not to be confirmed.

11 Subsequent to the final decree, appellant spent approximately
12 \$40,000 on a new irrigation system. Most of the new system has been
13 installed and has nearly the same point of diversion as the old
14 system. An additional expenditure of approximately \$2,000 would be
15 required to fully utilize appellant's surface water right.

16 V

17 On August 26, 1980, representatives of the Central Regional Office
18 of the Department of Ecology (DOE), during a routine field trip into
19 the Bonaparte Creek drainage, discovered the new pump installation on
20 appellant's land. Appellant was later informed that this installation
21 was unauthorized and was advised about the necessary application(s)
22 for a change of place of use or point of diversion of waters as
23 authorized by RCW 90.03.380. Appellant was further advised that the
24 possibility of getting approval for a change of place of use was not
25 likely because DOE, on July 14, 1976, adopted WAC 173-549-050 which

1 closed Bonaparte Creek to further consumptive appropriations during
2 the period between May 1 to October 1.

3 VI

4 Appellant submitted an application to DOE for a change of place of
5 use of the irrigation water right evidenced by Certificate No. 77 on
6 September 11, 1980. Appellant desired to move the use to the parcels
7 described as the south 330' of the SE 1/4 of the NE 1/4 of Section 21
8 and the north 330' of the NE 1/4 of the SE 1/4 of Section 21.

9 Appellant also owned these parcels of land. Appellant's reason for
10 the move was his belief that the original parcel was not suitable for
11 a profitable farm operation. Proper notice of the change was
12 published in the Oroville Gazette-Tribune, and no objections to the
change were received.

14 VII

15 It is the policy of DOE to withhold decisions on applications for
16 changes of water rights under RCW 90.03.380 until the completion of
17 any relevant adjudication. This is to clarify and to make certain all
18 the pending rights which were subject to the adjudication.

19 VIII

20 The Bonaparte Creek Adjudication was a proceeding wherein
21 testimony was taken and evidence was received under court rules. It
22 was filed in the Okanogan County Superior Court in 1968, and the final
23 decision was subject to appeal. There was no common law abandonment
24 found for the claim registered by appellant's predecessor in
25 interest. Statutory relinquishment, as defined in RCW Chapter 90.14,

1 was enacted in 1967.

2 IX

3 There was no injury found to any downstream appropriator by
4 appellant's proposed change of place of use. Appellant is senior to a
5 number of upstream junior appropriators.

6 X

7 The DOE, on April 15, 1982, issued a Report of Examination
8 concerning appellant's application. It was found by DOE that the
9 right confirmed by Certificate No. 77 had not been exercised for a
10 period in excess of five years and that it did not appear that the
11 full water use on 20 acres of land was ever perfected. Respondent
12 also found that approval of the requested change of place of use would
13 detrimentally affect existing rights by enhancing the right under
14 Certificate No. 77. The application was denied and an order of
15 relinquishment, pursuant to RCW 90.14.160, was to be issued upon
16 expiration of the 30-day appeal period of the Report and Order.

17 XI

18 Feeling aggrieved by the decision of the DOE, appellant filed an
19 appeal of the Report and Order with this Board and the matter came to
20 formal hearing.

21 XII

22 Any Conclusion of Law which should be deemed a Finding of Fact is
23 hereby adopted as such.

24 From these Findings the Board comes to these

25
26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB No. 82-58

CONCLUSIONS OF LAW

I

The Board has jurisdiction over the persons and the subject matter of this proceeding. RCW 43.21B. RCW 90.14.200.

II

This matter deals with the appellant's application for a change of place of use of his water right which is evidenced by Certificate No. 77 of the Bonaparte Creek Adjudication.

The right to the use of water which has been applied to a beneficial use in the state shall be and remain appurtenant to the land or place upon which it is used; provided, however, that said right may be transferred to another or to others and become appurtenant to any other land or place of use without loss of priority of right theretofore established if such change can be made without detriment or injury to existing rights...

RCW 90.03.380

III

Any person entitled to withdraw water under an adjudicated right:

who abandons the same, or who voluntarily fails, without sufficient cause, to beneficially use all or any part of said right to divert or withdraw for any period of five successive years after the effective date of this act, shall relinquish such right or portion thereof, and said right or portion thereof shall revert to the state, and the waters affected by said right shall become available for appropriation in accordance with RCW 90.03.250.

RCW 90.14.160.

This matter involves the de facto application of RCW 90.14.160 to the relinquishment of appellant's adjudicated water right certificate for nonuse under Chapter 90.14 RCW in a proceeding under RCW

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW & ORDER
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1 90.03.380. The certificate under consideration was issued pursuant to
2 the procedure outlined in RCW 90.03.110 through 90.03.240. The
3 Department has the burden of proving that the relinquishment of
4 Certificate No. 77 of the Bonaparte Creek Adjudication has, in fact,
5 occurred. Until respondent so proves, appellant will have a right
6 which is transferable under RCW 90.03.380.

7 IV

8 The legislature has found that extensive uncertainty exists
9 regarding the volume of private claims to water in the state. This
10 uncertainty seriously retards the efficient utilization and
11 administration of the state's water resources and impedes its fullest
12 beneficial use. The legislature has also found and required a strong
13 beneficial use requirement as a condition precedent to the continued
14 ownership of a right to withdraw or divert water and that this
15 requirement is essential to the orderly development of the state. RCW
16 90.14.020(1), (2), (3).

17 IV

18 The holder of a water right certificate will be excused from any
19 nonuse of his right if it can be shown that his nonuse was a result of
20 a "sufficient cause." Sufficient cause has been defined as:

21 ...the nonuse of all or a portion of the water by the
22 owner of a water right for a period of five or more
23 consecutive years where such nonuse occurs as a
24 result of: ...The operation of legal proceedings...

25 RCW 90.14.140(4)

1 Appellant claims that the Bonaparte Creek Adjudication was a legal
2 proceeding, thereby excusing his nonuse.

3 VI

4 There is no definition of "legal proceedings" found in chapter
5 90.14 RCW.² Black's Law Dictionary 807 (5th Ed. 1979) defines
6 "legal proceedings" as: "all proceedings authorized or sanctioned by
7 law and brought or instituted in a court or legal tribunal for the
8 acquiring of a right or the enforcement of a remedy." An adjudication
9 has been defined as:

10 The formal giving or pronouncing a judgment or decree
11 in a cause; also the judgment given. It implies a
12 hearing by a court, after notice legal evidence of
the factual issues involved. The equivalent of a
determination and contemplates that the claims of
parties thereto have been considered and set to rest.

13 Black's Law Dictionary 39 (5th Ed. 1979).

14 It is apparent from the above-quoted passages that the Bonaparte
15 Creek Adjudication was a "legal proceeding" for the purposes of RCW
16 90.14.140(4).

17 VII

18 The Bonaparte Creek Adjudication officially came to a close on
19 December 14, 1979. Prior to that time, appellant was not certain
20 whether he, in fact, was entitled to divert any water from Bonaparte
21 Creek. The adjudication defined and confirmed his right and
22 eliminated the uncertainty that existed prior to the final decree. By
23

24 2. RCW 2.42.020(3) describes "legal proceedings" as a "proceeding in
25 any court in this state...."

eliminating this uncertainty, the efficient utilization and administration of the waters of Bonaparte Creek can now be accomplished. Respondent and its predecessor agency participated in the adjudication proceeding and presumably would have had ample opportunity to question the water rights confirmed. In this case, the five-year period of successive nonuse necessary to establish a relinquishment under RCW 90.14.160 began running when the adjudication ended and the final decree was issued.

The Department did not show that appellant's right was for irrigation of only four acres. Accordingly, appellant's right may be transferred to other land if such change can be made without detriment or injury to existing rights.

VIII

It is unknown what effect, if any, appellant's change of place of use would have on existing rights located within the Bonaparte Creek drainage area if the right, or any portion of it, were moved to the proposed location. Appellant's right was confirmed for irrigation of 20 acres. His transferable right may be for nearly 20 acres or something less depending upon other interests in the same water right and the impact of the change on Bonaparte Creek. The Board remands the case to the Department to determine appellant's transferable right.

IX

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW & ORDER
PCHB No. 82-58

ORDER

The Washington State Department of Ecology Order denying the application for change of place of use under Surface Water Certificate No. 77 of the Bonaparte Creek Adjudication is reversed and remanded to the Department to determine what portion of appellant's water right may be transferred to the desired parcel without detriment to existing rights.

DATED this 24th day of March, 1983.

POLLUTION CONTROL HEARINGS BOARD

Gayle Rothrock
GAYLE ROTHROCK, Chairman

David Akana
DAVID AKANA, Lawyer Member

Did Not Participate
LAWRENCE J. FAULK, Member